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No. 85-1977

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

OIL INSURANCE LIMITED,
Petitioner,

- against -

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO
and
A.I.U. INSURANCE COMPANY, et al.,
Respondents.

Reply Brief in Support of Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Three

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I
PRELIMINARY STATEMENT

OIL Insurance Limited (O.I.L.) submits this Reply Brief, pursuant to Rule 22.5, solely to address arguments first raised in the Briefs In Opposition of The Travelers Insurance Company and of AIU Insurance Company *et al.*

II
LEGAL ANALYSIS

A. Providing Coverage For Three Non-Party California Companies And Paying For Unrelated California Losses Does Not Make O.I.L. Sufficiently "Present" To Be Subject To Jurisdiction For Claims Not Arising Out Of O.I.L.'s Forum-Related Economic Activity

Until the California Court of Appeal ruled in the present action, no case had ever held that the principal place of business of a few of a foreign insurance carrier's insureds renders that carrier subject to jurisdiction there in a suit involving a different insured, whose principal place of business is in a different state. According to the lower court, a foreign-based mutual insurer like O.I.L. is sufficiently "present" for jurisdictional purposes in any forum where one of its insureds does significant business or has paid a significant claim and the carrier can be sued there irrespective of whether the carrier or the underlying lawsuit has any legitimate connection to the chosen jurisdiction.

That analysis—adopted by Respondents—is overly broad, imposes undue burdens on foreign mutual insurance companies set up by their insureds, and ignores the constitutional requirements for determining "jurisdictional presence" when the claims in question do not arise out of the defendant's forum-related economic activity. Given that insureds are increasingly turning to offshore insurers with the aid and encouragement of Congress (witness the recent tax treaties with Bermuda and Barbados), this issue is of great importance and is likely to be a recurring problem if not settled definitively.

The present case does not involve a claim by any of O.I.L.'s three California resident-insureds or any effort to enforce a California judgment, returned in favor of a California resident or in favor of anyone else. Nor does this case involve a business transaction of any kind between O.I.L. and Respondents (or anyone else) that took place in or otherwise involves California. O.I.L.'s 37 shareholders/policyholders are large petroleum companies with assets and headquarters around the world. Most are multi-nationals and many are based in Europe, Canada or else-

where outside the United States. General jurisdiction is no more appropriate in California in this case than it would be in Indonesia, the Persian Gulf or in the middle of the North Sea, where O.I.L. shareholders/policyholders also have significant assets and operations.

Respondents offer no authority—and there is none—establishing the propriety of jurisdiction in any of these locales over a dispute with which they have no connection and in which they have no interest. Moreover, since the claims in question do not arise out of O.I.L.'s California-related economic activity, it is necessary to do what Respondents do not: determine whether O.I.L.'s contacts with California are so extensive or wide-ranging as to make O.I.L sufficiently "present" in California to support jurisdiction over O.I.L. *E.g., Sanders v. CEG Corp.,* 95 Cal.App.3d 779, 784 (1979). That determination, in turn, requires an analysis of "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977).

Respondents do not—and cannot—establish a significant relationship between O.I.L. and California. O.I.L., like the automobile distributor in *World-Wide Volkswagen, Corp. v. Woodson,* 444 U.S. 286 (1980), and the tire valve manufacturer in *Asahi Metal Industry Co., Ltd. v. Superior Court,* 39 Cal.3d 35 (1985), cert. granted, 106 S.Ct. 1258 (1986), is a foreign corporation with no office, property or agents in California.[1] Similarly O.I.L., like the defendants in *World-Wide* and *Asahi,* did nothing to avail itself of the privileges and benefits of forum law. O.I.L. has never solicited or issued insurance policies in California. *A.I.U. Insur-*

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[1] The Travelers asserts: ". . . . O.I.L. is not stranger to coverage litigation in the United States, having participated as a party in *Odeco, Inc. v. Avondale Shipyards, Inc.*, 663 F.2d 650 (5th Cir. 1981)." The Travelers Brief in Opposition, p. 5 fn. *Odeco,* however, took place in Louisiana which, unlike California, specifically authorizes direct actions against insurers, La. Rev. Stat. Ann. § 22:655 (West 1978). Further, unlike the instant action, both O.I.L. and its insured believed there was coverage—O.I.L. thus had no reason to challenge jurisdiction in *Odeco* because it was obligated to pay any resulting judgment against its insured whether or not it was in the suit.

ance Company, et al. v. Superior Court, 177 Cal.App.3d 281, 286 (1986).[2] O.I.L.'s premiums and coverage are also calculated and drafted for its insureds without regard to the location of any of their assets in California or their presence in that forum.

Moreover, O.I.L., *unlike* the defendants in *World-Wide* and *Asahi*, is not even the manufacturer of an allegedly defective product that flowed through the stream of commerce and eventually caused injury in the forum state. O.I.L.'s business consists solely of issuing insurance, worldwide in scope, to various petroleum companies, three of which happen to be California residents (but none of which is a party to the case in question) and of paying claims throughout the world, some of which have arisen in California.

Without question, O.I.L.'s three California resident insureds have paid significant premiums over the years for their worldwide coverage and O.I.L. has paid significant amounts on account of some of their losses that occurred in California. While those payments may demonstrate that O.I.L.'s *insureds* have a significant California "presence," they do not establish that the same is true of O.I.L. Nor do they "establish" that this dispute arose out of any forum-related economic activity—it obviously did not.

Respondents and the lower court accordingly support their assertion of jurisdiction upon a fatally-flawed syllogism:

Major Premise: A number of cases from *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) to *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392 (9th Cir. 1986), have found that any "purposeful contact" between a foreign insurer and the forum is sufficient to subject the carrier to jurisdiction;

Minor Premise: O.I.L. has collected millions of dollars in premiums from its three California-headquartered insureds and

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[2] The contrary assertion at page 4 of A.I.U.'s Brief In Opposition is incorrect. As explained by the Court of Appeal: "All of O.I.L.'s insurance policies have been issued in Bermuda [177 Cal.App.3d at 286]. . . . The insurance policies sent to California were merely convenience copies, not binding contracts." *Id.*

has paid out millions of dollars on account of California losses in California;

Conclusion: Therefore, O.I.L.'s contacts with California satisfy the *McGee-Haisten* "purposeful contact" test, and O.I.L. is subject to California jurisdiction in the present case.

Respondents' syllogism, however, relies entirely upon cases involving claims that arose out of an insurance carrier's *forum-related economic activity*:

McGee involved a foreign carrier's refusal to pay benefits under a life-insurance policy issued in California on the life of a California resident (355 U.S. at 321);

McClanahan v. Trans-America Ins. Co., 149 Cal.App.2d 171 (1957), concerned a foreign carrier's refusal to pay a California judgment, arising out of a California accident, the investigation and defense of which had been directed and controlled in California by the carrier and;

Haisten involved the refusal by a foreign carrier to pay a California judgment, in favor of a California resident against a California-resident who carried the insurance (784 F.2d at 1395-1396).

A claim arising from "forum-related" economic activity is admittedly absent here and the jurisdictional questions posed by this case are, therefore, *not resolved* by any case cited by Respondents from this Court or any other. While they may be novel from a legal perspective, they are by no means unique and will no doubt recur. Given the increasing use of mutual-type insurance companies, particularly by businesses with worldwide operations, the issues here in question are bound to reappear with increasing frequency. Unless this Court acts to clarify the situation, other litigants are obviously going to try to duplicate the California example in the state of their choice. Certiorari should issue so that needed clarification will be provided.

B. A.I.U.'s Suggestion That Shell Did Not Sue O.I.L. For Collusive Reasons Is Unfounded And Based On Multiple Factual Misstatements

A.I.U. hints darkly that Shell and O.I.L. are engaged in some collusive course of action, noting "[t]he only insurance company which Shell did not sue was its own captive insurer, O.I.L., which has provided Shell with comprehensive general liability coverage since 1976." A.I.U.'s Opposition Brief, p. 2-3.

While O.I.L. cannot imagine what bearing these charges—even if true—would have on the merits of O.I.L.'s certiorari petition, there is no need to engage in such conjecture, because A.I.U.'s innuendo is completely unfounded.

First, as A.I.U. itself later acknowledges, O.I.L., far from being Shell's "captive," is owned by and provides coverage "for 34 [actually 37] insureds." A.I.U.'s Opposition Brief, p. 4. Second, the term "occurrence"—as defined by the O.I.L. policy—is an event which *both* commences *and* causes injury during the policy term. Shell has been sued for pollution commencing in the 1940s and continuing to possibly the 1960s, but Shell has been an O.I.L. insured only since 1976. Accordingly, coverage under the O.I.L. policy is clearly excluded by the "occurrence" definition. Finally, Shell, O.I.L. and all of O.I.L.'s other shareholders have contractually agreed not to sue one another and to arbitrate their coverage disputes in London pursuant to New York law.

Thus, Shell's failure to sue O.I.L. reflects nothing more than Shell's decision not to pursue a pointless claim for coverage and to abide by its contractual obligation.

C. The Holding In Haisten In No Way Undermines The Fact That Arbitration Clauses In Truly International Contracts Should Be Entitled To Great Deference In The Jurisdictional Analysis

A.I.U. argues that the Court of Appeal's "ipso facto" dismissal of O.I.L.'s arbitration clause is in full accord with the Ninth Circuit's decision in *Haisten, supra,* 784 F.2d at 139.

Haisten involved a Cayman Islands insured formed solely to provide medical malpractice coverage for doctors who all practiced at a single, central California hospital, where the patients

would be overwhelmingly—if not exclusively—Californian. Thereafter, the California husband of a deceased California malpractice victim attempted to enforce a California judgment obtained against one of the insured California doctors. The District Court and Court of Appeal rejected the carrier's claim that the matter had to be arbitrated in the Cayman Islands noting that the carrier's activity was " 'purposefully directed' to participation in the California market." *Id.* at 1398.

Nothing in the *Haisten* opinion suggests that such clauses are irrelevant to the jurisdictional analysis when—as here—they are contained in a truly international commercial agreement that is in no way directed at California residents or the California insurance market. On the contrary, the presence of the arbitration clause in every policy O.I.L. issues internationally is simply a further indication of O.I.L.'s very legitimate expectation that it would not be involved in a coverage dispute in a California forum. O.I.L.'s legitimate expectations, moreover, cannot be ignored as A.I.U. contends. They are the focal point of the jurisdictional analysis.

III

CONCLUSION

Until the opinion in this case, no court has suggested that unrelated business activity, even if substantial, justifies the exercise of impersonam jurisdiction over a non-resident defendant in a forum that has no connection to, or interest in, the litigation. If the due process clause has an arm that long, this Court should say so. If it does not, this Court should so provide before other state and federal courts repeat the error to the substantial prejudice of worldwide mutual insurers.

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